

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

EXTENDA-CARE HEALTH FACILITIES, INC.,
D/B/A ARBORS EAST SUBACUTE &
REHABILITATION CENTER ^{1/}

Employer

and

Case 9-RC-17947

DISTRICT 1199, OH/WV/KY, THE HEALTHCARE
AND SOCIAL SERVICE UNION, SEIU, AFL-CIO ^{2/}

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer operates various healthcare facilities in the State of Ohio, including a facility in Columbus, Ohio, that provides care for the aged and infirmed. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer's employees at this facility. There apparently is no history of collective bargaining affecting any of the employees involved in this proceeding.

A hearing officer of the Board held a hearing in this matter on October 12, 2004. At the hearing, the parties agreed that the appropriate unit consists of all full-time, and regular part-time, state tested nursing assistants, nurse aides, dietary employees, and maintenance employees, employed by the Employer at its Columbus, Ohio facility; but excluding all registered nurses, licensed practical nurses, professional employees, technical employees, business office employees, clerical employees, other employees and all guards and supervisors as defined in the Act. The unit described consists of approximately 60 employees. I conclude that this is an appropriate unit for collective bargaining and will direct an election in such unit.

The only issue on which the parties disagree is whether the Maintenance Director, Robert Shonebarger, should be excluded from the Unit. The Employer, contrary to the Petitioner, contends that Shonebarger is a supervisor within the meaning of Section 2(11) of the

^{1/} The name of the Employer appears as reflected in the record.

^{2/} The name of the Petitioner appears as reflected in the record.

Act and therefore must be excluded from the unit. The Employer, however, had no evidence to present at that hearing regarding Shonebarger's alleged supervisory status. Instead, the Employer asserted at the hearing that it believed that witnesses would be unnecessary because it came prepared to stipulate to the unit that the Petitioner was, in essence, seeking and that it did not anticipate that the supervisory status of Shonebarger would be in issue. While the possibility of voting Shonebarger subject to challenge was raised at the hearing, the Petitioner would not agree to handle his eligibility on that basis.

As more fully explained below, because the Employer did not attempt to offer any evidence to support its position that Shonebarger is a supervisory employee, I will include him among the employees eligible to vote in the election. ^{3/}

II. EVENTS AT THE HEARING

It appears from the record that the parties developed the unit description set forth above as part of an off-the-record discussion prior to the hearing. The Hearing Officer then read the unit description into the record. After the parties stipulated to the appropriateness of the Unit, the Petitioner raised the issue of the Employer's contention that Shonebarger was a supervisor within the meaning of the Act. It further appears, but is unclear from the record, that the Petitioner may have learned of the Employer's position regarding Shonebarger during off-the-record discussions associated with developing the unit stipulation. The Hearing Officer asked the Petitioner if it was willing to allow Shonebarger to vote subject to challenge. The Petitioner indicated that it was not. The Employer stated that it was not prepared to provide any evidence of Shonebarger's supervisory status, because it did not realize that it was going to be an issue and because the Employer had come prepared to stipulate to the appropriateness of the bargaining unit. At the hearing, the Employer, in a statement on the record, proffered the basis for its conclusion that Shonebarger was a supervisor within the meaning of the Act. The Hearing Officer advised the Employer that its statement was not evidence and further cautioned the Employer that it had the burden of establishing supervisory status. The Employer did not request any delay in the proceeding to procure a witness on the issue nor did it seek to withdraw from the stipulation on the Unit.

III. ANALYSIS AND DETERMINATION

The burden of establishing that an individual is a supervisor within the meaning of Section 2(11) of the Act rests on the party - in this instance, the Employer - who asserts supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). The mere assertion by a party claiming that an individual is a supervisor within the meaning of the Act, in lieu of presenting actual evidence on the point, will result in a finding that such a party has not met its burden; the consequence being that the individual in issue will be treated as a non-supervisor. *St. Barnabas Hospital*, 334 NLRB 1000, fn 2 (2001). In initial representation case proceedings, the failure of the party seeking to disenfranchise an employee on the basis of his/her supervisory status to meet its burden results in the employee being considered an eligible voter for purposes of the representation election. See, e.g., *Los Angeles Water and Power*

^{3/} In reaching this determination, I have considered not only the arguments made by the parties at the hearing in this matter, but those contained in their post hearing briefs.

Employees' Association, 340 NLRB No. 146 (November 28, 2003); *Cook Composites and Polymers Co.*, 313 NLRB 1105, 1108 (1994).

In the instant case, the Employer came to the hearing but did not present any evidence to support its contention with respect to Shonebarger's supervisory authority. The Employer did not claim at the hearing, nor does it assert in its brief, that it was assured evidence would not be needed in support of its position. Thus, it cannot, and does not, claim to have been misled. Moreover, when faced with the supervisory issue and the Petitioner's unwillingness to vote Shonebarger by challenged ballot, the Employer did not request additional time to present evidence on this point.

The Employer argues in its brief that the matter should be resolved by allowing Shonebarger to vote subject to challenge and that any issue pertaining to his supervisory status may be resolved, if necessary, in a post-election proceeding. However, based on the record before me, there is no basis for me to direct that Shonebarger's vote be subject to challenge. As discussed above, there is no evidence that he is a supervisor within the meaning of the Act or is otherwise ineligible to vote. Further, there is no evidence that the Employer was prevented from presenting evidence regarding Shonebarger's supervisory status. Accordingly, the Employer has not met its burden of establishing that Shonebarger is a supervisor within the meaning of the Act.

Based on the forgoing, and the record as a whole, I conclude that Robert Shonebarger is a maintenance employee included in the Unit and is, therefore, eligible to vote. ^{4/}

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

^{4/} The Employer has not raised any eligibility issue with respect to Shonebarger other than his supposed supervisory status.

All full-time, and regular part-time, state tested nursing assistants, nurse aides, dietary employees, and maintenance employees, employed by the Employer at its Dayton, Ohio facility; but excluding all registered nurses, licensed practical nurses, professional employees, technical employees, business office employees, clerical employees, all other employees and all guards and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199, OH/WV/KY, The Healthcare and Social Service Union, SEIU, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **October 27, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 3, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 20th day of October 2004.

/s/ Gary W. Muffley

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Classification Index

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